91-1118

Supreme Court, U.S.
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NO.

in the Supreme Court of the United States

October Term, 1991

STAN BAUMANN,

Petitioner,

vs.

SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION AND RESOLUTION TRUST CORPORATION AS CONSERVATOR OF SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A.

PREFACE

The most critical question presented to the Eleventh Circuit Court of Appeals in the case at Bar was:

> WHEN A STATE COURT ACTION BY A BORROWER AGAINST AN S & L LENDER CULMINATES IN RENDITION OF A VERDICT AND JUDGMENT IN FAVOR OF BORROWER AND AGAINST LENDER, WHICH LENDER THEN FAILS, CAN FSLIC/RTC THEN APPEAR AS LENDER'S CONSERVATOR, REMOVE THE CASE FROM STATE TO FEDERAL COURT, AND APPEAL, THEN RELY ON A D'OENCH DOCTRINE/12 U.S.C. § 1823(e), DEFENSE WHICH PREVIOUSLY WAS LEGALLY UNAVAILABLE TO LENDER.

In the decision sought to be reviewed the Federal Appellate Court answered the foregoing question in the affirmative.

B.

FIRST QUESTION PRESENTED FOR REVIEW

> IN ANSWERING THE FOREGOING QUESTION IN THE AFFIRMATIVE HERE, DID THE ELEVENTH CIRCUIT COURT OF APPEALS RENDER A DECISION ON A QUESTION OF GENERAL FEDERAL LAW WHICH IS IN DIRECT, SQUARE AND IRRECONCILABLE CONFLICT WITH THE DECISIONS RENDERED BY THE CIRCUIT COURTS OF THE FIFTH AND TENTH CIRCUITS, RESPECTIVELY, IN:

THURMAN v. FEDERAL DEPOSIT INSURANCE CORPORATION, 889 F.2d 1441 (5 Cir. Tex. 1989); *OLNEY SAVINGS & LOAN ASSOC. v. TRINITY BANC SAVINGS ASSOC.*, 885 F.2d 266 (5 Cir. Tex. 1989); AND *GRUBB v. FEDERAL DEPOSIT INSURANCE CORP.*, 868 F.2d 1151 (10 Cir. Okla. 1989).

C.

SECOND QUESTION PRESENTED FOR REVIEW

IN ANSWERING THE FOREGOING QUESTION IN THE AFFIRMATIVE HERE, DID THE ELEVENTH CIRCUIT COURT OF APPEALS RENDER A DECISION WHICH SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

LIST OF PARTIES

A list of the parties follows:

1. Plaintiff, Stan Baumann ("BAUMANN") was plaintiff in the state trial court and appellee/cross-appellant in the federal appeal post removal.

2. Petitioner's wife, Phyllis Baumann ("MRS. BAUMANN") was made third party defendant in the state trial court. Although her name is mentioned in the final judgment rendered by the state trial court, said judgment makes no final dispositive rulings regarding MRS. BAUMANN. MRS. BAUMANN is nowhere mentioned as a party to the federal appellate proceedings.

3. Respondent, Savers Federal Savings & Loan Association ("SAVERS") was defendant in the state trial court and appellant/cross-appellee in the federal appeal post removal. Counsel for BAUMANN has no knowledge of any parent or subsidiary company to be listed in connection with SAVERS.

4. Post final state court judgment, the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed as conservator of SAVERS. After it was added as a party FSLIC removed the case to the Federal District Court for the Southern District of Florida. FSLIC was the original Eleventh Circuit Court of Appeals conservator/appellant/ cross-appellee. During the course of those proceedings, Resolution Trust Corporation ("RTC") was substituted as a party in place of FSLIC. FSLIC was then dropped from the style of the federal court appeal.

5. Respondent, RTC, as noted above, was substituted for FSLIC as party appellant/cross-appellee during the pendency of the federal appellate court proceedings.

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OPINIONS BELOW

The opinion/decision sought to be reviewed is reported at 934 F. 2d 1506 and also located at (A. 1-26).

The final judgment and opinion of the state trial court appealed is not reported. It is found at (A. 27-30).

JURISDICTIONAL STATEMENT

On July 9, 1991, the Circuit Court of Appeals entered the opinion sought to be reviewed. (A. 1-26)

On July 19, 1991, the parties filed an agreed joint motion for enlargement of time to file petitions for rehearing. (A. 57-59)

On July 26, 1991, the United States Court of Appeals entered its order granting motion for enlargement of time. (A. 60)

On August 28, 1991, BAUMANN timely filed a petition for rehearing. (A. 34-38)

On August 28, 1991, SAVERS/RTC filed a petition for rehearing. (A. 44-56)

On September 5, 1991, BAUMANN filed an Amended Petition for Rehearing. (A. 39-43)

On October 9, 1991, the Eleventh Circuit Court of Appeals entered an order denying the petitions for rehearing filed by BAUMANN and SAVERS/RTC. (A. 31-33)

These proceedings followed in due course.

The statutory provision which confers jurisdiction on this Court to review the decision sought to be reviewed by writ of certiorari is 28 U.S.C. § 1254. See also in this connection Supreme Court Rule 10 .1.(a) (1990).

STATUTES AND RULES INVOLVED

Jurisdictionally, 28 U.S.C. § 1254(1), provides:

* * *

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

* * *

In addition consideration should be given to this Court's Rule 10 .1.(a), *supra*, which provides:

* * *

".1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, *while neither controlling nor fully measuring the Court's discretion*, indicate the character of reasons that will be considered:

"a. When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; . . .; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions, such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

* * *

A resolution of the jurisdictional question involved here, and, eventually, the merits question as well, involves consideration of the following federal statutes:

1. 12 U.S.C. § 1823(e), the federal codification of the D'OENCH doctrine;

2. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 S. Stat. 183 (1989). Section 407 of FIRREA repealed numerous sections of the United States Code relating to FSLIC.

STATEMENT OF CASE AND FACTS

A.

PREFACE

This was a complex case. Perforce, even a "concise" statement of the case and facts material to consideration of the questions presented will be rather extensive. In stating the case and facts, BAUMANN will rely extensively upon the statement thereof contained in the decision sought to be reviewed. (A. 1-26) He will paraphrase therefrom. Where he disagrees with what the Court has said or believes the Court has omitted stating pertinent facts, BAUMANN will make reference to additional material included in his Appendix.

All emphasis appearing herein is supplied by counsel unless otherwise noted.

B.
THE PERTINENT FACTS
THE EARLY 1980S

BAUMANN, a real estate developer, built an apartment complex in Gainesville, Florida. He obtained loans for the project from SAVERS. His relationship with SAVERS was excellent and the project was completed in a satisfactory manner. (A. 6)

EARLY 1984

BAUMANN decided to build a shopping center complex ("CONCEPT I") in Plantation, Florida. It was to be anchored by a Winn-Dixie Supermarket and include a two-story office building. Because of past good experience, BAUMANN went to SAVERS for a loan.

SAVERS initially loaned BAUMANN $7,500,000 for CONCEPT I and received a mortgage and security interest. (A. 6)

Before CONCEPT I construction began, the City of Plantation Planning Board refused to approve CONCEPT I and recommended that the project site be re-zoned to prevent certain commercial uses including the Winn-Dixie anchor. BAUMANN filed suit against the City, but later abandoned the action in favor of a compromise plan ("CONCEPT II"). (A. 7)

1985

BAUMANN proposed CONCEPT II, for which he expected to receive City approval. It envisioned a larger development but with fewer retail units and more professional buildings. CONCEPT II required more money. SAVERS agreed to increase the construction loan total to

$9,750,000. BAUMANN signed the necessary papers for this increase. (A. 7)

The revised loan allowed BAUMANN to build two buildings initially, but conditioned further advances on his pre-selling additional units. Once part of CONCEPT II was completed, SAVERS would be required to release its lien on the real property for an established price. (A. 7)

DECEMBER, 1986

By late 1986, SAVERS had advanced more than $8,000,000 of the agreed upon loan amount. However, construction of CONCEPT II had come to a halt. BAUMANN was in default on the loan and could not pay the contractors and sub-contractors. (A. 7)

In December, 1986, BAUMANN filed suit against SAVERS in state court claiming that the failure of the project was due to SAVERS' breach of the loan agreements and failure to cooperate with BAUMANN. (A. 7)

In the words of the Eleventh Circuit Court of Appeals in the decision sought to be reviewed, in state court:

* * *

> "Baumann's theories of recovery were breach of the loan agreement, breach of Savers Federal's statutory duty of good faith, tortious interference, conversion, conspiracy, civil theft, and fraud. Savers Federal counter-claimed seeking to enforce the mortgage and to collect on the promisory note. Baumann's wife was also joined in the litigation and Savers Federal sought to collect on the personal guarantee of Baumann and his wife for the principal of the loan, interest, and collection costs.

The Baumanns defended on the ground that Savers Federal had impaired the collateral.

"At trial, Baumann contended that the loan was to be a '100 percent financed loan,' meaning that Baumann would not have to contribute any of his own money. Baumann alleged that Savers Federal had explained that Baumann was a preferred customer and that Savers Federal would be his partner in the project and would do everything possible to insure the timely and efficient completion of the project. Baumann also claimed that it was Savers Federal's lack of cooperation in adjusting Baumann's interest payments that prevented him from pursuing his suit against the City of Plantation. Baumann further asserted that Savers Federal continually delayed advancing funds to Baumann resulting in work stoppages and liens being placed on the property. Savers Federal, on the other hand, claimed that it had done everything required of it under the loan documents, and that any delays in the project were due to other factors, not the fault of Savers Federal. Savers Federal also argued that Baumann had not proved any damages." (A. 7-8)

* * *

DECEMBER 1, 1988

The jury returned a verdict finding that SAVERS had breached its loan agreements with BAUMANN *and its statutory duty of good faith cooperation.* It also found that SAVERS had impaired BAUMANN'S collateral. The jury awarded BAUMANN $15,400,000 for breach of contract and breach of good faith, and $8,740,000 for impairment of collateral. (A. 8)

DECEMBER 29, 1988

The trial court, non-jury, decided SAVERS' counterclaim. It held that SAVERS could foreclose on its mortgage and, therefore, was entitled to an $8,034,797.10 setoff against the jury award. The trial court found that SAVERS had unclean hands. (A. 8)

JANUARY 25, 1989

The trial court entered a final judgment awarding BAUMANN a net judgment of $7,365,202.90. In making this calculation, the court ignored the jury award to BAUMANN of $8,740,000 for impairment of collateral. (A. 8-9)

It must be emphasized that at the time of entry of the trial court's January 25, 1989, final judgment in favor of BAUMANN, SAVERS was defending the case on its own as it had been, and was, insofar as anyone knew, solvent.

FEBRUARY 10, 1989

SAVERS was declared insolvent by the Federal Home Loan Bank Board which appointed FSLIC conservator of SAVERS. By virtue of then extant federal law and its status as conservator, FSLIC became a party to this litigation. (A. 9)

FEBRUARY 13, 1989

FSLIC removed this case from Florida court to Federal District Court. Shortly thereafter FSLIC and SAVERS filed a notice of appeal to the Eleventh Circuit Court of Appeals from the final *state court* judgment rendered January 25, 1989. BAUMANN filed an appropriate timely notice of cross appeal. (A. 9)

MARCH 10, 1989

The Federal District Court remanded the case to state court. During the period of remand, on March 17, 1989, FSLIC and SAVERS filed a precautionary notice of appeal with the District Court of Appeal, Fourth District of Florida. BAUMANN filed a notice of cross appeal. (A. 9)

APRIL 24, 1989

The Federal Court of Appeals granted FSLIC and SAVERS' petition for writ of mandamus, allowing this case to remain in federal court and treating the proceedings in state court as if they had occurred in the Federal District Court. *See IN RE: SAVERS FEDERAL SAV. & LOAN ASS'N*, 872 F. 2d 963 (11 Cir. 1989). (A. 9)

AUGUST 9, 1989

FIRREA became effective. Pursuant to its provisions RTC was eventually substituted as a party here for FSLIC as conservator of SAVERS. (A. 9-10)

After various administrative proceedings concerning the Purchase and Assumption Agreement between RTC and SAVERS, RTC, as receiver of SAVERS disallowed BAUMANN'S claim on May 29, 1990, stating that the claim should not be upheld on appeal. BAUMANN elected to forego further administrative proceedings and allow the appeal to the *Federal* Eleventh Circuit Court of Appeals from the *state court* final judgment to proceed to a conclusion. (A. 10)

JULY 9, 1991

The Eleventh Circuit Court of Appeals entered the opinion sought to be reviewed. The first issue addressed by

the Court was whether the D'OENCH doctrine—*D'OENCH, DUHME & CO. v. FEDERAL DEPOSIT INS. CORP.*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 2d 956 (1942)—could be applied to this case. BAUMANN strenuously insisted that it could not because SAVERS was not even declared insolvent until post-entry of final judgment at the state court level. He properly raised the question presented for review as stated herein, *supra*. In his brief BAUMANN argued that D'OENCH/§ 1823(e), *supra*, could not fairly, rightly or justly be applied to the case at Bar, primarily, because the very reason for the life and existence of these rules were not present here. *That is, this case was fully and fairly litigated inter se BAUMANN and SAVERS before SAVERS was declared insolvent. Thus, the D'OENCH/§ 1823(e), supra,* defenses were not even legally available to SAVERS at the time the case was litigated.

In the opinion sought to be reviewed the Federal Appellate Court rejected—it really didn't even consider—BAUMANN'S arguments in favor of a simplistic argument to the effect that RTC should be allowed to raise an issue not raised below for the first time on appeal under an exception to the rule preventing such arguments.

As a bottom—non-merits—line the Eleventh Circuit Court of Appeals in the opinion/decision sought to be reviewed applied D'OENCH/§ 1823(e), *supra*, to the case at Bar, held that the doctrine had been violated here, and reversed the final judgment appealed remanding the cause "for a new trial."

As pointed out herein, *supra*, BAUMANN'S timely filed motion for rehearing was denied and these proceedings followed in due course.

Anent jurisdiction in the Eleventh Circuit Court of Appeals in the first instance, *see IN RE: SAVERS*

FEDERAL SAV. & LOAN ASS'N, supra, 872 F. 2d 963 (11 Cir. 1989); and § 501 of FIRREA which grants RTC removal powers, now codified at 12 U.S.C. § 1441a(1).

REASONS FOR GRANTING THE WRIT

In STEM, GRESSMAN & SHAPIRO, Supreme Court Practice, 6th Ed. (1986), § § 4.4, pp. 197-202 and 4.11, pp. 212-213, the following well established principles are concisely and succinctly stated:

* * *

"4.4 *Conflict Between Decisions Of Courts of Appeals.*

"The Supreme Court *usually*, but not necessarily, will grant certiorari where the decision of a federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals on the same matter of *federal* law or on the same matter of *general* law as to which federal courts can exercise independent judgments. One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions in these matters among the federal courts of appeals. Hence, a square and irreconcilable conflict of this nature *ordinarily* should be enough to secure review. (Emphasis the authors') [Citations omitted]

* * *

"It was frequently said in the past that where there is such a square conflict on federal questions 'the Supreme Court grants certiorari as of course, and irrespective of the importance of the question of law involved.' But it has become increasingly

clear that the existence of a conflict, without more, is not always enough to convince the Court that certiorari should be granted. . . .

* * *

"The Court as a whole now seems committed to giving the existence of a conflict less than decisive weight. Yet the Court continues to grant certiorari in many cases that do not appear to be 'certworthy' for any reason other than the existence of a conflict, real or alleged. But the recurring refusal of the Court over strong dissents to review what appear to be important questions as to which the lower courts are in conflict indicates either (1) *that importance to a high degree may sometimes be necessary even where there is a conflict*, or (2) that other unrevealed factors may be treated as decisive by many of the justices in these situations.

* * *

"(1) The important and recurring nature of the issue in conflict often plays a decisive role in the grant or denial of certiorari. The Court has implied as much by referring repeatedly in its opinions to the fact that certiorari was granted 'to resolve the conflict on this important question' [Citations omitted], or 'because of the importance of the question presented and the conflict of opinion on the constitutional issue involved' [Citation omitted]. . . or 'on account of the importance of the federal questions raised and asserted conflicts in the Circuits' [Citation omitted], or 'because this conflict involves an important question of statutory construction' [Citations omitted], or because of a conflict 'and the need for a uniform rule on the

point' [Citation omitted], or because of a conflict and the fact 'a considerable number of suits are pending in the lower courts which will turn on resolution of these issues' [Citations omitted], or because a conflict developed over 'which has become a most troublesome question in the administration of justice' [Citation omitted], or because 'this is a question of importance not heretofore considered by this Court, and one over which the Circuits are divided' [Citation omitted]. What may be necessary, therefore, is a conflict on an important issue—or at least not too unimportant an issue. If the dispute is minor or technical, the conflict alone may be insufficient. . . .

* * *

4.11 *Importance of Issues Involved.*

"The importance of the issues involved in the case as to which review is sought is of major significance in determining whether the writ of certiorari will issue. The Court does not have time to give full consideration to all cases which present novel or interesting issues. *It must necessarily confine itself to those which reflect the more important legal problems within the realm of its jurisdiction.* And the problem though intrinsically important, must be 'beyond the academic or the episodic.' . . .

"The concept of importance relates, of course, to the importance of the issues 'to the public as distinguished from' importance to the particular 'parties' involved [Citations omitted]. . . ."

* * *

In this connection the provisions of Revised Rule 10.1.(a) are again deserving of consideration as indicia of the character of reasons which will be considered in determining whether or not to take direct conflict jurisdiction. To reiterate, the following are deserving of great consideration:

* * *

> "(a) When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; *or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such as departure by a lower court, as to call for an exercise of this Court's power of supervision.*"

* * *

The most important merits question presented here was, as indicated herein, *supra*,

> WHEN A STATE COURT ACTION BY A BORROWER AGAINST AN S & L LENDER CULMINATES IN RENDITION OF A VERDICT AND JUDGMENT IN FAVOR OF BORROWER AND AGAINST LENDER, WHICH LENDER THEN FAILS, CAN FSLIC/RTC THEN APPEAR AS LENDER'S CONSERVATOR, REMOVE THE CASE FROM STATE TO FEDERAL COURT, AND APPEAL, THEN RELY ON A D'OENCH DOCTRINE/12 U.S.C. § 1823(e), DEFENSE WHICH PREVIOUSLY WAS LEGALLY UNAVAILABLE TO LENDER.

In the decision sought to be reviewed the Eleventh Circuit Court of Appeals answered that question in the affirmative.

In *THURMAN v. FEDERAL DEPOSIT INSURANCE CORPORATION, supra*, 889 F. 2d 1441, FSLIC moved to intervene in an action brought by mortgagors to enjoin a mortgagee savings and loan association from foreclosing and seeking damages and cancellation of the notes. FSLIC'S motion was filed *after judgment had been rendered in favor of the mortgagors.* The District Court denied the motion to intervene. The appellate court held that FSLIC could intervene but *could not* assert new and unique D'OENCH DOCTRINE defenses to the mortgagors' claims. The appellate court, *inter alia*, stated:

* * *

> "FSLIC Corporate relies on Federal Deposit Ins. Corp. v. Castle, 781 F. 2d 1101 (5th Cir. 1986), to argue that it should be allowed to raise its federal defenses as a post-judgment intervenor. In Castle a bank sued in state court to collect $2.75 million owing on a $5.5 million note from three guarantors. Before trial the FDIC became the receiver of the bank and sold the note to FDIC in its corporate capacity. The FDIC was substituted as the party plaintiff in state court proceedings later removed to federal district court. At trial the guarantors defended against the FDIC on the ground that the recitations of the loan documents, that the guarantors guaranteed the entire debt, did not reflect an oral agreement with the bank limiting the guaranty to 25% of the amount owed. The guarantors contended that they had signed blank guaranty agreements and that the bank had fraudulently filled in 100% instead of 25% in the

blanks. We noted that 'the goal of finality 'must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the case,'' *id.* at 1104 (quoting Seven Elves, Inc. v. Eskenazi, 635 F. 2d 396, 401 (5th Cir. 1981)), and allowed the FDIC Corporate to raise its statutory D'Oench, Duhme defense, 12 U.S.C. § 1823(e), for the first time in a Fed. R. Civ. P. 60(b) motion for relief from judgment.

"FSLIC Corporate argues that Castle controls its right to assert its federal common law defenses upon intervention. . .

* * *

"In support of its right to assert new defenses FSLIC Corporate relies on Castle. However, *in Castle FDIC Corporate was a party when the case was tried. FSLIC Corporate was not.* In Castle we concluded in a close case that substantial interests in finality were outweighed by the equity of obtaining a just result. While a just result inquiry arguably begs the question of new defenses versus finality, we allowed FDIC Corporate to assert its clearly applicable D'Oench, Duhme defense so that the judgment might reflect the 'true merits' of the case. However, even assuming a similar role for D'Oench, Duhme in this case, we are persuaded of a different outcome. *Where the party asserting new defenses is a post-judgment intervenor, and the newly proffered defense would not have changed the outcome of the case as it was tried, there is little to justify the upset of the judgment.* In this weighing of interests we do no violence to the policies behind D'Oench, Duhme. The parties to

the suit at trial were the parties to the transaction. *The difficulties attending a receiver's finding that notes in the case are subject to unrecorded agreements were absent. See Grubb v. Federal Deposit Ins. Corp.*, 868 F. 2d 1151, 1159 (10th Cir. 1989). Nor are we unmindful that our approach creates a disincentive to gamble on a verdict while holding a D'Oench, Duhme trump card. Despite the curious timing of events we do not rest our ruling on a view that in this case the FSLIC so timed its move, because, in any event, *refusing the new and unique defense works no unjust result here.* It is true that FSLIC Corporate was more diligent in asserting its federal defenses than was FDIC Corporate, *but the fact remains that when final judgment was rendered below, five days before the receivership was created, no party to the case could have asserted these defenses.* Accordingly, we affirm the district court's refusal to allow FSLIC Corporate to intervene to assert its new and unique defenses." (889 F. 2d 1441 at 1446-1447)

* * *

GRUBB v. FEDERAL DEPOSIT INSURANCE CORP., supra, 868 F. 2d 1151, was an action brought by an investor against a bank for securities fraud. After trial the jury awarded the investor a substantial money judgment on his federal and state securities fraud claims. Post trial, the bank filed appropriate post trial motions, all of which were denied. The bank thereafter filed an appeal in the United States Court of Appeals for the Tenth Circuit.

After the bank filed its notice of appeal, it encountered severe financial difficulties. Eventually the Comptroller of the Currency declared the bank insolvent and appointed the

FDIC as receiver. At that late point in the case FDIC became a party to the appeal.

On appeal FDIC filed a motion for summary disposition pursuant to a Tenth Circuit Court local rule seeking to assert D'OENCH/§ 1823(e) defenses which were concededly available to FDIC but which would not have been available to the bank prior to its insolvency. *In rejecting this contention and denying the motion for summary disposition,* the Tenth Circuit Court of Appeals, *inter alia,* stated and held:

* * *

> "The FDIC now argues that Langley [Langley v. FDIC, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed. 2d 340 (1987)] controls this case so that § 1823(e) and D'Oench justify summary disposition in its favor on both Grubb's fraud claims and First National's counter-claims. We disagree. Langley does not apply because of significant procedural and factual differences between it and the present case.
>
> "*In this case, the District Court has entered a judgment denying First National recovery on the Weatherford holding and Grubb notes before the FDIC purchased the bank's assets in a P & A transaction.* Unlike the notes in Langley, which were merely voidable when the FDIC acquired them, these notes had already been *voided* by the judgment when the FDIC purchased First National's assets. (Emphasis the Court.) Therefore, the FDIC acquired no 'right, title or interest' in the Grubb and Weatherford holding notes that the fraud claims and defenses could 'diminish or defeat,' and § 1823(e) does not bar those claims and defenses. . . .

* * *

"Additionally, because a judgment already existed when the FDIC purchased First National's assets, the purposes of § 1823(e) are not vitiated. The judgment provided the FDIC a reliable record indicating that the notes were void, and collusion between Grubb and First National seems highly unlikely because the parties had fully and heatedly litigated the securities fraud issue to judgment before the bank failed. Thus, Langley and § 1823(e) do not apply to this case." (868 F. 2d 1151 at 1158-1159)

* * *

In *OLNEY SAVINGS & LOAN ASSOC. v. TRINITY BANC SAVINGS ASSOC., supra*, 885 F. 2d 266 (5 Cir. 1989), the Fifth Circuit Court of Appeals on similar facts rendered a decision in total accord with the above quoted decisions in THURMAN and GRUBB.

Reverting to the case at Bar, for the reasons which follow, the opinion/decision sought to be reviewed is in direct, square and irreconcilable conflict with the decisions rendered by the Circuit Courts of the Fifth and Tenth Circuits, respectively, in THURMAN, OLNEY and GRUBB, and the writ should issue:

1. The cited cases hold that where the FDIC, FSLIC, or, implicitly, RTC are involved in a case post final judgment where the failed S & L has become insolvent post final judgment, the D'OENCH/§ 1823(e) doctrines are unavailable to the federal agency.

2. The predicate for this decision—in addition to the common sense and equity of the rule—is that under such

circumstances, the very reason for the existence of the D'OENCH/§ 1823(e) doctrines do not exist.

3. The doctrines themselves would, of course, not even be available to the S & L during the course of its litigation with the opposing party.

4. Under such circumstances as involved in the case at Bar and the cited cases, there is a "reliable record indicating" there has been no "collusion between" the S & L and the claimant, or, at the very least, it "seems highly unlikely" that there was collusion "because the parties had fully and heatedly litigated the" issues involved between them in the action "before the" S & L failed. *See GRUBB, supra.*

5. Where a party such as FDIC, FSLIC, or RTC attempts to assert new defenses as a post judgment intervenor, "and the newly proffered defense would not have changed the outcome of the case as it was tried, there is little to justify the upset of the judgment." *See THURMAN, supra. Here, there is no chance whatsoever that the newly proffered defense would have changed the outcome of the case as it was tried because the defense is not legally available to a solvent S & L. Indeed, it is not even available to an insolvent S & L where FDIC, FSLIC or RTC has sat on the sidelines gambling on a verdict while holding a D'OENCH, DUHME trump card." See THURMAN, supra.*

6. The question presented for decision to the Circuit Court here is obviously one of great public importance and extremely "certworthy." There can be no doubt that in addition to being important, this question is going to be a recurring one because of the huge number of S & Ls and banks which have failed or are on the verge of failure.

7. The question involved here goes far "beyond the academic or episodic." Its importance relates "to the general public as distinguished from" importance to just the parties involved here.

8. *Indeed, the question is so important that the ruling of the Eleventh Circuit Court of Appeals in its decision/opinion sought to be reviewed constitutes such an extreme departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."*

9. Any distinctions which were drawn by the Eleventh Circuit Court of Appeals between THURMAN, OLNEY and GRUBB and the case at Bar are distinctions without differences. In this regard, it must be emphasized that the Eleventh Circuit Court of Appeals either did not understand the question presented or, in reality, dodged answering the question in favor of relying on a general rule not argued by BAUMANN below. That rule is the rule which prevents raising an issue for the first time on appeal. The Court relied on an exception to that general appellate rule in order to answer the question presented in the affirmative. The Court's logic is completely flawed *because it overlooks the fact that the particular defense involved here could not have been raised by SAVERS in the first instance at the trial court level.*

CONCLUSION

It is respectfully submitted that for the reasons stated herein, this Court should grant the subject petition for issuance of writ of certiorari, issue the writ and set this case for briefing and oral argument on the merits. Post briefing and oral argument, this Court should quash the decision sought to be reviewed and remand this cause to the Eleventh Circuit Court of Appeals with directions to reinstate the jury verdict and render judgment in favor of BAUMANN and against SAVERS/RTC for the full amount assessed due by the jury from SAVERS to BAUMANN and not the net amount for which the trial court rendered judgment in favor of BAUMANN below. At the very least judgment should be rendered in favor of BAUMANN and against SAVERS/RTC in the net amount for which the trial court rendered judgment in favor of BAUMANN below.

Respectfully submitted,

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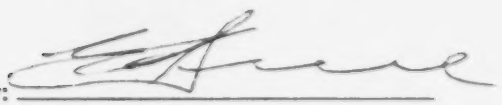
By: 
Edward A. Perse

Dated: Friday, January 3, 1992.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, and accompanying Appendix, was served, by U.S. mail, this 3rd day of January, 1992, on opposing counsel:

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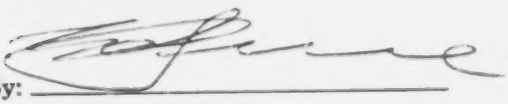

By: _____
Edward A. Perse

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Stan BAUMANN, Plaintiff-Appellee, Cross-Appellant,

v.

SAVERS FEDERAL SAVINGS & LOAN ASSOC. and Resolution Trust Corporation, as conservator of Savers Federal Savings and Loan Association, Defendants-Appellants, Cross-Appellees.

No. 89-5208.

United States Court of Appeals,
Eleventh Circuit.

July 9, 1991.

Borrower obtained state court judgment that savings and loan had breached loan agreements and statutory duty of good faith, but state court also held that savings and loan could foreclose on its mortgage. Thereafter, savings and loan was declared insolvent, and the Federal Savings and Loan Insurance Corporation (FSLIC) was appointed its conservator, FSLIC removed case to federal district court, and FSLIC and savings and loan appealed and developer cross-appealed the judgment to the Court of Appeals. The United States District Court for the Southern District of Florida, No. 89-6105—Civ-NCR, Norman C. Roettger, Jr., J., remanded the case to state court. After grant of petition for writ of mandamus that allowed case to remain in federal court, the Resolution Trust Corporation (RTC) was substituted for the FSLIC. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) did not provide the RTC with new substantive rights including ability to raise for first time on appeal *D'Oench* issue that federal deposit insurer was not bound by agreements between borrowers and financial institutions not expressed in written agreements between parties; (2) RTC as receiver for savings and loan would be permitted to raise *D'Oench*

issue for first time on appeal; and (3) testimony regarding oral assurances allegedly provided to borrower by savings and loan officials was prohibited by *D'Oench* doctrine, and case would be remanded for retrial.

Reversed and remanded.

1. Federal Courts —611

Generally, Court of Appeals will not address argument unless it has been raised in district court.

2. Federal Courts —616

Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) did not provide the Resolution Trust Corporation (RTC) in its capacity as conservator or receiver with new substantive rights including ability to raise, for first time on appeal, *D'Oench* issue that federal deposit insurer was not bound by agreements between borrowers and financial institutions not expressed in written agreements between parties. Federal Deposit Insurance Act, § 2[11](d)(13)(B), as amended, 12 U.S.C.A. § 1821(d)(13)(B).

3. Federal Courts —611

Application of general rule that Court of Appeals will not address issue that has not been decided by trial court is in discretion of appellate court, and there are situations where it is appropriate for Court of Appeals to entertain argument not raised in lower court.

4. Federal Courts —616

Resolution Trust Corporation (RTC) as receiver for insolvent savings and loan would be permitted to raise, for first time on appeal, *D'Oench* doctrine, under which federal deposit insurer is not bound by agreements between borrowers and financial institutions that are not expressed in written agreements between parties, where RTC had not

been party to suit at trial level; RTC which was proper party on appeal should not be penalized for not raising defense which it had no opportunity to present, and even if application of *D'Oench* doctrine changed outcome of case, that result would have occurred if RTC had entered litigation earlier, so concerns such as finality or fairness to parties were not implicated.

5. Building and Loan Associations —42(6)

Fact that validity of loan agreements had been fully litigated before the Resolution Trust Corporation (RTC) was appointed conservator of insolvent savings and loan did not preclude RTC from claiming that it was unaware of alleged oral side agreements regarding documented loans, for purpose of applying *D'Oench* doctrine under which federal deposit insurer is not bound by agreements between borrowers and financial institutions that are not expressed in written agreements between parties. Federal Deposit Insurance Act, § 2[13](e), as amended, 12 U.S.C.A. § 1823(e).

6. Building and Loan Associations —42(6)

Cases interpreting *D'Oench* doctrine, under which federal deposit insurer is not bound by agreements between borrowers and financial institutions that are not expressed in written agreements between parties, and statutory codification of *D'Oench* doctrine were precedent controlling case involving Resolution Trust Corporation (RTC) where, after passage of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), the statutory codification applied to RTC as well as to the Federal Deposit Insurance Corporation (FDIC). Federal Deposit Insurance Act, § 2[13](e), as amended, 12 U.S.C.A. § 1823(e); Federal Home Loan Bank Act, § 21A(b)(4), as amended, 12 U.S.C.A. § 1441a(b)(4).

7. Banks and Banking —505

In suit over enforcement of agreement originally executed between insured depository institution and private party, private party may not enforce against federal deposit insurer any obligation not specifically memorialized in written document that would make agency aware of the obligation when conducting examination of institution's records. Federal Deposit Insurance Act, § 2[13](e), as amended, 12 U.S.C.A. § 1823(e).

8. Banks and Banking —505

Exception to *D'Oench* doctrine for situation when borrower is completely innocent of and intentional or negligent deception in her defense against her debt, is no longer tenable; lack of bad faith, recklessness, or even negligence is not a defense in *D'Oench* cases.

9. Building and Loan Associations —42(16)

D'Oench doctrine, under which federal deposit insurers are not bound by agreements between borrowers and financial institutions not expressed in written agreements between parties, prohibited testimony regarding oral understandings not recorded in documentation of loans made by savings and loan that subsequently became insolvent, and for which the Resolution Trust Corporation (RTC) acted as receiver; savings and loan's officials allegedly agreed that loan was 100% financed loan so that borrower developer would not need to use any of his own money to finance project and allegedly told borrower developer that savings and loan would be his partner in development project.

10. Building and Loan Associations —42(6)

As between private parties and federal deposit insurance agencies, both Congress and the Supreme Court

have placed burden on private parties to document fully contours of their obligations from inception of transaction and, accordingly, fact that borrower might have had no intention of misleading regulators when he obtained oral assurances from savings and loan's officials with respect to documented loans was irrelevant.

11. Building and Loan Associations —42(16)

Jury verdict for borrower in suit alleging breach of loan agreement, breach of statutory duty of good faith by savings and loan, tortious interference, conversion, conspiracy, civil theft, and fraud did not indicate that verdict was based solely on written documents regarding loans, so as to permit verdict to stand after Resolution Trust Corporation (RTC) as receiver was permitted to assert *D'Oench* doctrine.

12. Banks and Banking —505

D'Oench doctrine, under which federal deposit insurers are not bound by agreements between borrowers and financial institutions not expressed in written agreements between parties, does not protect federal agencies where bilateral obligations are evident on face of documents at issue.

13. Building and Loan Associations —42(16)

Borrower might be able to recover from savings and loan for which the Resolution Trust Corporation (RTC) was receiver in suit alleging that savings and loan breached terms of written loan documents or failed to perform its obligations in good faith, and case would accordingly be remanded for new trial subject to limitations of *D'Oench* doctrine, where jury had rendered verdict for borrower after trial involving testimony regarding obligations outside scope of written loan documents excludable under *D'Oench* doctrine.

Appeals from the United States District Court for the Southern District of Florida.

Before KRAVITCH and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

In *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), the Supreme Court first held that the Federal Deposit Insurance Corporation ("FDIC") is not bound by agreements between borrowers and financial institutions that are not expressed in the written agreements between the parties. In this case of first impression in this circuit, we must decide whether the Resolution Trust Corporation ("RTC") can raise the *D'Oench* doctrine for the first time on appeal. Because we hold that it can, we reverse and remand for a new trial.

I

In the early 1980s, Stan Baumann, a real estate developer, built an apartment complex in Gainesville, Florida. Baumann obtained loans for the project from Savers Federal Savings & Loan Association ("Savers Federal"). In 1984, Baumann decided to build a new project, and again contacted Savers Federal for financing. The new project (known as "Concept I") was to be a retail shopping center in Plantation, Florida. Concept I was to be anchored by a Winn-Dixie supermarket and later was to include a two-story office building.

Savers Federal initially loaned Baumann $7,500,000 for Concept I and received a mortgage and security interest. Baumann also gave Savers Federal a promissory note for the above amount, plus interest, costs, expenses, and disbursements. Baumann and his wife guaranteed the note. Finally, Baumann agreed to pay reasonable attorneys' fees and other costs and expenses incurred in enforcing the guaranty.

Before construction began on Concept I, the City of Plantation Planning Board refused to approve Concept I and recommended that the proposed site for the project be rezoned to prevent certain commercial uses, including the Winn-Dixie store. Baumann filed suit against the City of Plantation. He later abandoned the suit, however, and sought a compromise plan with the city.

In 1985, Baumann proposed Concept II, which he expected to receive approval from the city. Concept II envisioned a larger development, but with fewer retail units and more professional buildings. Concept II required more money, and Savers Federal agreed to increase the loan total to $9,750,000. Baumann therefore signed a second promissory note for the additional amount of $2,250,000. Baumann and his wife again guaranteed the loan. The revised loan allowed Baumann to build two buildings, but conditioned further advances on Baumann's pre-selling additional units. Once part of Concept II was completed, Savers Federal would then release its lien on real property for an established price.

By late 1986, after Savers Federal had advanced more than $8,000,000 of the loan amount, construction of Concept II had come to a halt. Baumann was in default on the loan and could not pay contractors. In December 1986, Baumann filed suit against Savers Federal, claiming that the failure of the project was due to Savers Federal's breach of the loan agreements and failure to cooperate with Baumann.

II

Baumann's suit originally was filed in Florida circuit court. Baumann's theories of recovery were breach of the loan agreement, breach of Savers Federal's statutory duty of good faith, tortious interference, conversion, conspiracy, civil theft, and fraud. Savers Federal counterclaimed, seeking to foreclose on the mortgage and to collect on the promissory note. Baumann's wife also was joined in the litigation, and

Savers Federal sought to collect on the personal guaranty of Baumann and his wife for the principal of the loan, interest and collection costs. The Baumanns defended on the ground that Savers Federal had impaired the collateral.

At trial, Baumann contended that the loan was to be a "100% financed loan," meaning that Baumann would not have to contribute any of his own money. Baumann alleged that Savers Federal had explained that Baumann was a preferred customer and that Savers Federal would be his partner in the project and would do everything possible to ensure the timely and efficient completion of the project. Baumann also claimed that it was Savers Federal's lack of cooperation in adjusting Baumann's interest payments that prevented him from pursuing his suit against the City of Plantation. Baumann further asserted that Savers Federal continually delayed advancing funds to Baumann, resulting in work stoppages and liens being placed on the property. Savers Federal, on the other hand, claimed that it had done everything required of it under the loan documents, and that any delays in the project were due to other factors, not the fault of Savers Federal. Savers Federal also argued that Baumann had not proved any damages.

On December 1, 1988, the jury returned a verdict. It found that Savers Federal had breached its loan agreements with Baumann and its statutory duty of good faith. The jury also found that Savers Federal had impaired Baumann's collateral. The jury awarded $15,400,000 for the breach of contract and breach of good faith, and $8,740,000 for the impairment of collateral. On December 29, 1989, the court decided Savers Federal's counterclaim, which had not been submitted to the jury. The court held that Savers Federal could foreclose on its mortgage, and therefore was entitled to $8,034,797.10. The court did not allow costs and fees, however, based on its finding that Savers Federal had unclean hands. On January 25, 1989, the court entered a final judgment, awarding Baumann $15,400,000 and Savers

Federal $8,034,797.10, for a net judgment of $7,365,202.90 in favor of Baumann. In making this calculation, the court ignored the jury's award to Baumann of $8,740,000 for the impairment of collateral.

On February 10, 1989, Savers Federal was declared insolvent by the Federal Home Loan Bank Board, which appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") conservator of Savers Federal. By virtue of its status as conservator, FSLIC became a party to this litigation. On February 13, 1989, pursuant to 12 U.S.C.A. § 1730(k)(1)(C),[1] FSLIC removed the case from the Florida court to federal district court. FSLIC and Savers Federal then filed a notice of appeal in this court from the final judgment rendered on January 25, 1989. On March 10, 1989, Baumann filed a notice of cross-appeal. Also on March 10, the district court remanded the case to state court. On April 24, however, this court granted FSLIC and Savers Federal's petition for writ of mandamus, allowing the case to remain in federal court and treating the proceedings in the state court as if they had occurred in the federal district court. *In re Savers Federal Sav. & Loan Ass'n*, 872 F.2d 963 (11th Cir. 1989).

On August 9, 1989, President Bush signed into law the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. 101-73, 103 Stat. 183 (1989). Under section 501(a) of FIRREA, 103 Stat. at 370, the Resolution Trust Corporation ("RTC") was substituted for FSLIC in situations, such as this case, where FSLIC was acting as conservator of a financial institution. On October 4, 1989, the Office of Thrift Supervision ("OTS") directed that a purchase and assumption transaction take place. First, Savers Federal was transferred from conservatorship to receivership. Also, OTS chartered another institution,

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[1] This section was later repealed by section 407 of FIRREA. Section 501 of FIRREA granted RTC removal powers, which are now codified at 12 U.S.C.A. § 1441a(*l*).

Savers Savings Association Institution ("Savers Savings"). Savers Savings then purchased all assets of Savers Federal, including Savers Federal's claims against Baumann. Liabilities of Savers Federal, including Baumann's claim against Savers Federal, were retained by RTC as receiver of Savers Federal. Simultaneously, OTS declared Savers Savings insolvent and appointed RTC as conservator.

After various administrative proceedings took place pursuant to the purchase and assumption agreement, RTC, as receiver of Savers Federal, disallowed Baumann's claim on May 29, 1990, stating that the claim should not be upheld on appeal. Baumann then elected to forego further administrative proceedings and allow the present appeal to determine the outcome of his case.

III

The first issue we must address is whether the doctrine of *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), applies in this case. In *D'Oench*, a bank and its customer engaged in a scheme whereby the customer provided a demand note to the bank, which the bank reflected on its books; the bank promised, however, that it would not actually collect on the note, a factor the bank did not reflect on its books. The FDIC later became the successor in interest to the bank and attempted to collect on the note. The customer argued that the parties had an agreement that the bank would not collect on the note. In rejecting the customer's defense, the Supreme Court stated that "federal policy . . . protect[s] [FDIC] and the public funds it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [FDIC] insures or to which it makes loans." *Id.* at 457 62 S.Ct. at 679. The Court therefore held that because the agreement not to collect on the note was not recorded in the bank's records, the customer was barred from enforcing the agreement against FDIC. As we discuss in Part IV, the rationale behind *D'Oench* has been

extended far beyond the factual setting in *D'Oench* itself, and now applies to virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records.

[1] Because RTC did not enter this case until after final judgment had been entered in the trial court, the trial court did not have an opportunity to decide the *D'Oench* issue. RTC asserts that it is entitled to raise the issue for the first time on appeal. In general, this court will not address an argument unless it has been raised in the district court. *Federal Deposit Ins. Corp. v. 232, Inc.*, 920 F.2d 815, 817 (11th Cir. 1991); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1557 (11th Cir. 1990); *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360 (11th Cir. 1984). Although we reject RTC's argument that FIRREA creates a statutory right in RTC to raise *D'Oench* for the first time on appeal, we nonetheless hold that the case falls within an exception to the general rule, and therefore allow RTC to raise its argument for the first time in this court.

A

[2] RTC argues that FIRREA specifically requires us to address the *D'Oench* issue for the first time on appeal. Section 212(a) of FIRREA, 103 Stat. at 232 (codified at 12 U.S.C.A. § 1821(d)), is entitled "Conservatorship and Receivership Powers of the Corporation,"[2] and provides the following:

(13) Additional rights and duties

(A) Prior final adjudication

The Corporation shall abide by any final unappealable judgment of any court of competent

[2] Although the "corporation" referred to in this section is FDIC, FIRREA grants these powers to RTC as well. *See* 12 U.S.C.A. § 1441a(b)(4).

jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B) Rights and remedies of conservator or receiver

In the event of any appealable judgment, the Corporation as conservator or receiver shall —

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

According to RTC, RTC entered this litigation when it was at the appealable judgment phase, thus paragraph (B) above allows it to assert all of its "rights and remedies" at this stage of the proceedings.

Only one circuit court decision has confronted this issue. In *Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n*, 885 F.2d 266 (5th Cir. 1989), FSLIC, acting as conservator, entered the litigation after final judgment in the district court and argued that section 212(a) of FIRREA allowed it to raise *D'Oench* for the first time on appeal. The Fifth Circuit disagreed, stating that the statute simply "means that conservators and receivers are given standing to pursue all appeals, where before its enactment only FDIC acting in its corporate capacity could pursue certain claims. This section gives FSLIC no new substantive rights in this appeal." *Id.* at 275.

Relying on recent Texas state court decisions that have disagreed with *Olney, see Federal Sav. and Loan Ins. Corp. v. T.F. Stone-Liberty Land Assoc.*, 787 S.W.2d 475 (Tex.Ct.App.), *writ granted*, 34 Tex. Sup.Ct.J. 90 (1990); *FDIC/Manager Fund v. Larsen*, 793 S.W.2d 37 (Tex.Ct.App.

1990), RTC claims that FIRREA intended to grant more than just "standing" to RTC in this situation. According to RTC, if Congress had intended the provision to do no more than confer standing, it would not have used the phrase "all the *rights and remedies* available to . . . the Corporation in its corporate capacity." *See* 12 U.S.C.A. §1821(d)(13)(B)(i) (emphasis added).

We agree with the *Olney* court that the statute does not give RTC in its capacity as conservator or receiver new substantive rights. RTC's reading of the statute would not only give RTC as conservator or receiver "all the rights and remedies" of RTC "in its corporate capacity," but would actually give RTC *greater* powers as conservator or receiver than it has in its corporate capacity. This is because neither FIRREA nor prior existing statutes grant RTC in its corporate capacity the power to raise arguments for the first time on appeal. Section 1821, which applies only to RTC acting as conservator or receiver, therefore, cannot grant this right merely by granting all the rights and remedies of RTC in its corporate capacity.

The flaw in RTC's argument is easily exposed by examining another Fifth Circuit case. In *Thurman v. Federal Deposit Ins. Corp.*, 889 F.2d 1441 (5th Cir. 1989), FSLIC, acting in its *corporate* capacity, was assigned certain assets pursuant to a purchase and assumption transaction. This assignment occurred after a final judgment concerning the assets had been rendered in the trial court. FSLIC-corporate then intervened in the case and attempted to raise *D'Oench* for the first time on appeal.

In one portion of the opinion, the *Thurman* court addressed the recent enactment of FIRREA. *See Thurman*, 889 F.2d at 1444. In declining to address *D'Oench* for the first time on appeal, however, the court did not consider section 1821, the provision at issue in this case. This was not due to an oversight by the court or the parties; the issue was not raised for the simple reason that FSLIC was not entitled

to raise it. Section 1821(d) is entitled "Powers and duties of Corporation as *conservator or receiver.*" In *Thurman*, FSLIC was acting in its *corporate capacity, not* in its capacity as conservator or receiver, and thus was unable to avail itself of section 1821.

Having examined the circumstances of *Thurman*, it now can be seen that RTC's argument in this case falls of its own weight. RTC claims that section 1821(d)(13)(B) was intended to give RTC "all the rights and remedies" of RTC acting in its corporate capacity, including its right to argue *D'Oench*. Yet the right at issue in this case is not the right of RTC to argue *D'Oench*, which is unquestioned, but rather the right of RTC to raise an argument for the first time on appeal. If RTC were acting in its corporate capacity, as it was in *Thurman*, it would have no statutory basis to claim that it was entitled to raise issues for the first time on appeal. To allow RTC acting as a conservator or receiver to do so based on the "all the rights and remedies" language of section 1821(d)(13)(B) would be to grant *more* power than would be available to RTC in its corporate capacity. Yet the statute specifically grants only those rights and remedies available to the RTC "in its corporate capacity." Thus, any right of RTC to raise *D'Oench* for the first time on appeal does not come from section 1821.

B

[3] Although section 1821(d)(13) does not confer upon the RTC in its conservator or receiver status a statutory right to raise issues for the first time on appeal, we must determine whether our cases nevertheless allow it to do so. As discussed above, this court generally will not address an issue that has not been decided by the trial court. Application of this rule, however, is in the discretion of the appellate court, *see Federal Deposit Ins. Corp. v. 232, Inc.*, 920 F.2d 815, 817 (11th Cir. 1991), and there are situations where it is appropriate for us to entertain an argument not raised below. In *Dean Witter Reynolds, Inc. v. Fernandez*,

741 F.2d 355 (11th Cir. 1984), this court described five such situations:

> First, an appellate court will 'consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice.' Second, the rule may be relaxed where the appellant raises an objection to an order which he had no opportunity to raise at the district court level. Third, the rule does not bar consideration by the appellate court in the first instance 'where the interest of substantial justice is at stake.' Fourth, 'a federal appellate court is justified in resolving an issue not passed on below ... where the proper resolution is beyond any doubt.' Finally, it may be appropriate to consider an issue first raised on appeal if that issue presents significant questions of general impact or of great public concern.

Id. at 360-61 (citations omitted); *see also In re Daikin Miami Overseas, Inc.*, 868 F.2d 1201, 1206-07 (11th Cir. 1989) (addressing the five considerations).

[4] We conclude that this case falls within the second exception above. Although the *D'Oench* argument was not raised in the trial court, we will address it here because RTC had no opportunity to raise it at the appropriate time. This is consistent with the purposes behind the general rule. Under normal circumstances, allowing a party to raise an argument or objection for the first time on appeal creates an incentive for parties to litigate a case while keeping certain issues in reserve, hoping to later overturn an unfavorable result. *Cf. United States v. Sutherland*, 428 F.2d 1152, 1158 (1970) ("Having tried and appealed its case on one theory, an unsuccessful party may not then use a petition for rehearing as a device to test a new theory."). We often have stressed that a party had an opportunity to raise an issue in the trial court but failed to do so. *See, e.g., Formby v. Farmers and Merchants Bank*, 904 F.2d 627, 634 (11th Cir. 1990); *United*

States v. Richards, 646 F.2d 962, 963 (5th Cir. June 1981),[3] *cert. denied*, 454 U.S. 1097, 102 S.Ct. 669, 70 L.Ed.2d 638 (1981); *Delesdernier v. Porterie*, 666 F.2d 116, 125 (5th Cir.), *cert. denied*, 459 U.S. 839, 103 S.Ct. 86, 74 L.Ed.2d 81 (1982). Here, we need not be concerned with the possibility of strategically reserving, or simply carelessly litigating, certain issues because RTC was not a party to the suit at the trial level. Now that RTC is a proper party to the suit, it should not be penalized for not raising a defense it had no opportunity to present.

Our determination also does no damage to other concerns such as finality or fairness to the parties. There is no question that had Savers Federal been declared insolvent and RTC appointed conservator just a few days earlier, RTC would have been entitled to raise *D'Oench*. In fact, this court has addressed arguments made by federal banking regulators that were raised for the first time on a motion for reconsideration in the trial court. *See Federal Deposit Ins. Corp. v. McCullough*, 911 F.2d 593, 598 (11th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2235, ____ L.Ed.2d ____ (1991). Here, if RTC had raised its argument on a motion for reconsideration, the district court would have had to engage in the same analysis that we will undertake. If *D'Oench* changes the outcome of the case, that result would have occurred if RTC had entered the litigation earlier. Thus, examination of a valid substantive issue hardly seems unfair. Indeed, it would be unfair to prevent RTC from raising a legitimate argument at the earliest time it was able to do so.

[5] Baumann argues, however, that application of *D'Oench* in these circumstances is inappropriate because the purposes of the doctrine are not served by application at this late stage of the proceedings. According to Baumann, the

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

purpose of the *D'Oench* doctrine is to ensure that bank examiners are not misled by secret agreements that prevent examiners from determining the true value of a bank's assets. Here, the validity of the agreements had been fully litigated before the RTC was appointed conservator of Savers Federal; thus, Baumann contends that RTC cannot claim that it was unaware of the so-called oral side agreements in this case.

Although, as Baumann correctly points out, the purpose of the *D'Oench* doctrine is to prevent banks and their customers from hiding the true value of a financial institution's assets from government regulators, Baumann's argument misunderstands the nature of the harm following such deception. In *Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987), a unanimous Supreme Court addressed a bank customer's argument that FDIC could not rely on 12 U.S.C.A. § 1823(e), the statutory codification of *D'Oench*, where FDIC knew of alleged misrepresentations before it acquired the note at issue in the case. The Court stated:

> Harm to the FDIC (and those who rely upon the solvency of its fund) is not avoided by knowledge at the time of acquiring the note. The FDIC is an insurer of the bank, and is liable for the depositors' insured losses whether or not it decides to acquire the note. The harm to the FDIC caused by the failure to record occurs no later than the time at which it conducts its first bank examination that is unable to detect the unrecorded agreement and to prompt the invocation of available measures, including termination of the bank's deposit insurance.

Id. at 95, 108 S.Ct. at 403 (citations omitted). Therefore, according to the Court, when addressing the requirements of section 1823(e), "[a]n agreement that meets them prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew." *Id.* at 95,

108 S.Ct. at 403. *See also Victor Hotel Corp. v. FCA Mortgage Corp.*, 928 F.2d 1077, 1082 (11th Cir. 1991) (knowledge of a bank's misrepresentation at time FDIC acquires asset irrelevant for purposes of analyzing section 1823(e)); *Federal Sav. & Loan Ins. Corp. v. Two Rivers Assoc., Inc.*, 880 F.2d 1267, 1275 n. 12 (11th Cir. 1989) (*D'Oench* applies regardless of FSLIC's knowledge at time it acquires asset).

We also note that our determination that RTC may raise *D'Oench* for the first time on appeal when it did not have the opportunity to raise it below is not inconsistent with other circuit court opinions that have refused to allow banking authorities to do so. In *Olney Sav. & Loan Ass'n v. Trinity Banc Sav. Ass'n*, 885 F.2d 266 (5th Cir. 1989), in addition to rejecting FSLIC's statutory argument, *see supra*, Part III(A), the court further held that it would not make an exception to the common law rule of not addressing arguments for the first time on appeal. In that case, the district court determined that certain participation agreements were void and therefore rescinded the agreements. On appeal, the court held that FSLIC could not raise *D'Oench* and other unique federal defenses because FSLIC had never acquired a "right, title or interest" in the agreements. Because the judgment of the district court rendered the agreements void, FSLIC never acquired an asset upon which to base its arguments. *Id.* at 274-75; *see also Grubb v. Federal Deposit Ins. Corp.*, 868 F.2d 1151, 1158-59 (10th Cir. 1989) (certain notes were voided by the district court's judgment, thus preventing FDIC from acquiring any "right, title or interest" in the notes upon which to base its *D'Oench* argument); *Thurman v. Federal Deposit Ins. Corp.*, 889 F.2d 1441, 1447 (5th Cir. 1989) (relying on *Grubb* and further noting that upsetting the judgment of the trial court was unnecessary because "the newly proffered defense would not have changed the outcome of the case as it was tried. . . ."). In this case, there is no contention that the trial court's judgment rendered the

loan agreements void. Rather, the judgment required Savers Federal to pay damages based on the breach of valid agreements. The judgment also awarded Savers Federal the right to collect the principal of the loan, subject to Baumann's award. Because there is a valid interest remaining in RTC, it may attempt to protect that interest. Our conclusion is consistent with another panel opinion of the Fifth Circuit, which stated, without referring to either *Olney* or *Thurman*, that "[a]s the FDIC had neither opportunity nor occasion to assert the *D'Oench* doctrine in the trial court, we will entertain its assertion here." *Union Federal Bank of Indianapolis v. Minyard*, 919 F.2d 335, 336 (5th Cir. 1990) (footnote omitted).

In sum, RTC had no opportunity to raise its *D'Oench* argument in the trial court. While we realize that allowing RTC to raise it here for the first time may result in overturning the outcome reached in the trial court, we are aware of Congress's recognition that "[t]he appointment of a conservator or receiver can often change the character of litigation. . . ." H.R.Rep. No. 54, 101st Cong., 1st Sess. at 331 (1989), *reprinted in* 1989 U.S. Code Cong. & Admin.News 86, 127. We too recognize that change, and therefore hold that RTC is entitled to raise an argument at the first stage of the proceedings at which it is able to do so.

IV

[6] We now determine the effect that *D'Oench* has on this case. As discussed above, the Court in *D'Oench* held that in litigation between a bank customer and the FDIC, as successor in interest to a bank, the customer may not rely on agreements outside the documents contained in the bank's records to defeat a claim of the FDIC. *D'Oench*, 315 U.S. at 459, 62 S.Ct. at 680. This rule ensures that banks and their customers will include the entire extent of their obligations in the bank's records, thus allowing bank examiners to assess accurately the financial condition of the bank. *Id.* This rule was later codified by the Federal Deposit Insurance Act of

1950, §2[13](e), 64 Stat. 889, as amended, 12 U.S.C.A. §1823(e), as follows:

> No agreement which tends to diminish or defeat the interest of the Corporation [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement —
>
> (1) shall be in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

Since the passage of FIRREA, this provision also applies to the RTC. *See* 12 U.S.C.A. §1441a(b)(4). Before passage of FIRREA, courts had determined that the purposes of *D'Oench* and section 1823(e) were the same, and therefore had applied the same analysis regardless of whether the party involved in the case was the FDIC or another federal banking regulator. *See Twin Const., Inc. v. Boca Raton, Inc.*, 925 F.2d 378, 382 & n. 2 (11th Cir. 1991); *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1105 (11th Cir. 1990). We therefore consider cases interpreting *D'Oench* or section 1823(e) as precedent.

[7] Since the Court's decision in *D'Oench*, the doctrine has expanded greatly. In *Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987), the

Supreme Court held that even if a bank fraudulently induces a customer into signing a note, section 1823(e) bars the customer from relying on the bank's misrepresentations as a defense to payment of the note. *Id.* at 92-93, 108 S.Ct. at 401-02. Subsequent cases have made clear that the *D'Oench* doctrine applies even where the customer is completely innocent of any bad faith, recklessness, or negligence. *See Federal Sav. & Loan Ins. Corp. v. Gordy*, 928 F.2d 1558, 1566 (11th Cir. 1991).

As a result of the frequent failures of financial institutions in recent years, the federal courts have had several opportunities to address the *D'Oench* issue. A number of opinions have traced the history of *D'Oench*, section 1823(e), and the cases that have interpreted them, and have discussed the policies behind the doctrine and various situations in which the doctrine applies. *See, e.g., Gordy*, 928 F.2d 1558, 1561-64; *Twin Const.*, 925 F.2d at 381-83; *McCullough*, 911 F.2d at 599-601; *Vernon*, 907 F.2d at 1104-08; *Bell & Murphy and Assoc., Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 752-54 (5th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990); *Beighley v. Federal Deposit Ins. Corp.*, 868 F.2d 776, 782-84 (5th Cir. 1989); *Federal Deposit Ins. Corp. v. Newhart*, 892 F.2d 47, 49-50 (8th Cir. 1989). We need not reiterate the reasoning in this growing list of opinions that outline all the subtleties of the doctrine. Rather, we simply state the rule that has emanated from these cases: In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records. *McCullough*, 911 F.2d at 600.

[8] The sweep of the doctrine is so broad that a recent panel of this court noted that

> after extensive research, this Court has unearthed only three types of situations where an assertion of *D'Oench* failed to bar the defense raised by the debtor to resist enforcement of the debt instrument: when the borrower is completely innocent of any intentional or negligent deception in her defense against her debt; when the defense is manifest on the face of the obligation the insurer seeks to enforce; and when the borrower is a nonnegligent victim of fraud in the factum.

Vernon, 907 F.2d at 1101 n. 2. As for the first of these three situations, the panel cited *Federal Deposit Ins. Corp. v. Meo*, 505 F.2d 790 (9th Cir. 1974). In light of our recent decisions on this issue, *see, e.g., Gordy*, 928 F.2d at 156-67, it is clear that this exception is no longer tenable because lack of bad faith, recklessness, or even negligence is not a defense in *D'Oench* cases. The second situation occurred in *Howell v. Continental Credit Corp.*, 655 F.2d 743 (7th Cir. 1981). In that case, the Seventh Circuit noted that the document at issue clearly evidenced the obligation which the private party sought to enforce. Thus, bank examiners could not have been deceived. Finally, in *Langley*, 484 U.S. at 93, 108 S.Ct. at 402, the Court noted in dictum that while fraudulent inducement did not defeat enforcement by the FDIC, fraud in the factum might do so. Fraud in the factum renders an instrument entirely void, thus leaving the FDIC no interest in its enforcement. *See also Federal Deposit Ins. Corp. v. Turner*, 869 F.2d 270, 276 (6th Cir. 1989); *but see McLemore v. Landry*, 898 F.2d 996, 1002 (5th Cir. 1990) (declining to read fraud in the factum exception into *Langley*) (citing *Templin v. Weisgram*, 867 F.2d 240, 242 (5th Cir. 1989)), *cert. denied*, ____ U.S. ____, 111 S.Ct. 428, 112 L.Ed.2d 412 (1990).

[9] In this case, significant portions of the testimony at trial focused on oral understandings not recorded in the loan documents. For example, Baumann testified at several points in the trial that the loan at issue was a "100%

financed loan," and therefore Baumann would not need to use any of his own money to finance the project. This became significant when Concept I encountered problems with the City of Plantation Planning Board. According to Baumann, he could have maintained his suit against the city if Savers Federal would have suspended the running of interest or deducted the interest monthly from the interest reserve. Because Savers Federal did not do so, Baumann claimed he could not afford to pay both interest to Savers Federal and attorney's fees in his suit against the city. Nothing in the loan documents, however, required Savers Federal to either fund Baumann's litigation or alter the interest payment schedule. Although the documents gave Savers Federal the option to deduct from the interest reserve, it was not a requirement.

Baumann also testified that Savers Federal was required to go beyond its obligations in the loan documents because Savers Federal officials had told Baumann that Savers Federal would be his partner in the project. The loan documents specifically provided, however, that it was not the intention of the parties to be partners and that "the relationship of the parties shall be and remain that of debtor and creditor." Confronted with this provision of the agreement, Baumann testified that this was simply a "boilerplate" clause. Baumann's son, who assisted his father in negotiating the loan, also stated that he believed that he was in a partnership with Savers Federal. When asked whether the "no partnership" provision of the documents controlled, he stated: "Not when someone represents to me what their relationship is going to be with me, sir. That is what [a Savers Federal official] did."

The testimony above is prohibited by the *D'Oench* doctrine. The oral assurances allegedly provided to Baumann by Savers Federal officials go beyond the scope of the written loan documents. In reviewing Savers Federal's records, federal examiners would not have been put on

notice that Savers Federal did not have the option described in the loan documents, but rather a contractual duty, to alter the interest scheme provided in the documents when Baumann ran into trouble with the city planning board. Examiners could not have expected that despite the contractual language stating that the parties would maintain a debtor-creditor relationship, Savers Federal had in fact agreed to assume the duties normally associated with a partnership relationship. Such information may have been critical to examiners in reviewing what Baumann conceded was a "high risk" loan.

[10] Although this result may seem unfair to Baumann, he had the opportunity to include the entire agreement in writing. By not doing so, he "lent himself to a scheme or arrangement whereby the banking authority . . . was or was likely to be misled." *D'Oench*, 315 U.S. at 461, 62 S.Ct. at 681. That Baumann may have had no intention of misleading regulators is of no moment. As between private parties and federal deposit insurance agencies, both Congress and the Supreme Court have placed the burden on private parties to document fully the contours of their obligations from the inception of the transaction.

[11] Baumann further argues, however, that even if *D'Oench* precludes evidence of oral agreements outside the written documents, the jury's verdict indicates that it was based solely on the written documents. According to Baumann, he never argued that Savers Federal breached any oral side agreements, but rather argued simple breach of contract and breach of good faith. The jury found in his favor on these issues. The jury rejected his claims for fraud and other "oral" theories of recovery. Thus, Baumann contends that the jury must have based its verdict on the written documents themselves. We disagree. First, we note that the elements of the claims upon which Baumann prevailed and the claims upon which he did not are sufficiently different that we cannot speculate as to the

rationale behind the jury's conclusions. Second, nothing in the jury instructions indicates that the jury was informed that it could not consider evidence indicating an understanding of the parties contrary to that expressed in the loan documents. In light of the repeated testimony that Savers Federal "agreed" or was "obligated" to perform significantly beyond the obligations specified in the documents and to act as Baumann's partner, we find it unlikely that the jury relied solely on the written documents in making its determinations on the contract claims.

[12,13] Finally, we note that although the above analysis warrants reversal of the outcome reached in the trial court, we cannot ultimately resolve the case at this stage of the proceedings. We reach this conclusion based on our determination that a jury could still find in favor of Baumann in this case. As discussed above, much of the testimony at trial concerned obligations outside the scope of the written documents. Other evidence at trial, however, focused on whether Savers Federal had breached the terms of the written documents, or had failed to perform them in good faith. As the Seventh Circuit pointed out in *Howell v. Continental Credit Corp.*, 655 F.2d 743 (7th Cir. 1981), the *D'Oench* doctrine does not protect federal agencies where bilateral obligations are evident on the face of the documents at issue. *Id.* at 746-47. Application of *D'Oench* in such circumstances would not further the purposes of the doctrine. Bank examiners cannot be misled by documents that evidence the true obligations of the parties. Although appropriate documentation cannot inform examiners of whether or not an institution will breach its agreements, such documentation does inform examiners of the extent of the institution's obligations, and therefore puts examiners on notice of the riskiness of an obligation and the amount of potential liability should the agreement be breached. Examiners are fully aware that any agreement could be breached, and the likelihood of this occurring must be taken into account in an evaluation of an institution's assets and

liabilities. Thus, the protections provided to the deposit insurance fund by the *D'Oench* doctrine would not be furthered by allowing financial institutions to breach valid agreements or to carry them out in bad faith.

Here, Baumann claimed that Savers Federal failed to pay Baumann's draw requests in accordance with the schedule dictated in the loan documents. There are disputes in the testimony concerning when draw requests were received and when they were actually paid. There were also disputes concerning whether Savers Federal improperly failed to release its lien on part of the property in accordance with the loan documents. A jury conceivably could find that Savers Federal breached its obligations under the agreement or breached its duty to perform its obligations in good faith. So long as the jury's findings were not tainted by evidence of obligations not found in the loan documents, these findings could dictate a result in favor of Baumann. Because of the other evidence introduced at trial before RTC became a party to the case, however, we cannot know upon what facts the jury based its decision. Only a new trial, conducted in conformance with the *D'Oench* doctrine, can provide an answer.

V

In accordance with the above discussion, the decision of the trial court is REVERSED and REMANDED for a new trial.[4]

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[4]Due to this result, we need not reach RTC's other arguments.

IN THE
CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 86-32441 CD
CASE NO. 87-4901 CJ

STAN BAUMANN,

Plaintiff,

vs.

SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION,

Defendant.

FINAL JUDGMENT

THIS MATTER proceeded to trial on November 14, 1988. The factual issues submitted to the jury were:

1. a) The claim of Plaintiff, STAN BAUMANN; and

b) The defense of impairment of collateral as applied to the claim of SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION ("SAVERS") for relief upon the Guaranty Agreement.

SAVERS' claim for relief on the indebtedness secured by its Mortgage and Guaranty Agreement were submitted to the Court for resolution.

On the 1st day of December, 1988, the jury returned a verdict as follows:

"We the Jury, return the following verdict":

1. On the following claims of STAN BAUMANN against SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION, we find for:

A. BREACH OF CONTRACT —

STAN BAUMANN X SAVERS __

B. BREACH OF STATUTORY DUTY OF GOOD FAITH —

STAN BAUMANN X SAVERS __

C. TORTIOUS INTERFERENCE —

STAN BAUMANN __ SAVERS X

D. CONVERSION OF ($27,000) —

STAN BAUMANN __ SAVERS X

E. CONSPIRACY ($27,000) —

STAN BAUMANN __ SAVERS X

F. CIVIL THEFT —

STAN BAUMANN __ SAVERS X

G. FRAUD —

STAN BAUMANN __ SAVERS X

If you found for STAN BAUMANN on any one or more of the above claims then answer question #2. If you found for SAVERS on all claims then answer question #4.

2. Please state the amount of compensatory damages sustained by STAN BAUMANN on his claims, which were caused by SAVERS.

$15,400,000.00

3. If your answer to "C" or "G" under question #1 was for STAN BAUMANN, please state the amount of Punitive Damages, if any, you assess against Savers.

$ 0

4. On the issue of the guaranty, do you find that SAVERS impaired the collateral of STAN BAUMANN?

YES X NO __

If your answer to question #4 was yes, then please answer question #4. If your answer to question #4 was no, then please date and sign this verdict form.

5. What is the amount that SAVERS has impaired the collateral of STAN BAUMANN?

$8,740,000.00

So say we all this 1st day of December, 1988.

/s/ Harris M. Lerner, Foreman
Foreperson

2. SAVERS' claims for relief are resolved by the Court as follows:

a) That SAVERS have judgment against STAN BAUMANN foreclosing the Mortgage and for the principal amount upon the debt;

b) That SAVERS have judgment for the principal amount of the Guaranty against STAN BAUMANN and PHYLLIS BAUMANN; and

c) That SAVERS be denied any recovery of interest, costs or expenses due on the Mortgage indebtedness or Guaranty by reason of the doctrine of unclean hands.

THEREFORE, it is ORDERED AND ADJUDGED:

1. The amount of the jury award to STAN BAUMANN shall be reduced by the amount of the award to SAVERS on its Counterclaim against STAN BAUMANN and Third Party Complaint against PHYLLIS BAUMANN.

2. After deduction of the award to SAVERS on its Counterclaim in the amount of $8,034,797.10 from the Jury Verdict to STAN BAUMANN in the amount of $15,400,000.00, Plaintiff, STAN BAUMANN, shall have and recover from and against Defendant, SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION, the sum of

$7,365,202.90. Said sum shall bear interest at the legal rate per year from the date hereof until this Judgment is satisfied.

3. As a result of the Court applying the amount of $8,034,797.10 as a deduction to the jury award to STAN BAUMANN, SAVERS is entitled to no further recovery. Therein the mortgage and Security Agreement as filed of record in Official Records Book 11828, Pages 79-109, of the Public Records of Broward County, Florida, subsequently amended and redated and filed of record in Official Records Book 12329, Page 334, of the Public Records of Broward County, Florida, in favor of SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION, along with any modifications, amendments or additions thereto, and that certain Lis Pendens also filed of record in Official Records Book 14498, Page 374, of the Public Records of Broward County, Florida, are hereby discharged and extinguished of record.

4. SAVERS is denied any recovery of interest, expenses or other charges on its Counterclaim by reason of the doctrine of unclean hands. The Court reserves jurisdiction to tax costs in favor of the Plaintiff, STAN BAUMANN, and to enter any further Orders consistent and necessary herein.

5. Execution hereunder shall issue by further Order of this Court.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida, this 25 day of January, 1989.

A TRUE COPY

_____

Circuit Judge

Copies furnished to:
Counsel

J. CAIL LEE

IN THE
CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 86-32441 CD
CASE NO. 87-4901 CJ

STAN BAUMANN,

Plaintiff,

vs.

SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION,

Defendant.

ORDER ON POST TRIAL MOTIONS OF DEFENDANT

THIS MATTER came before the Court on December 29, 1988, on Defendant's, SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION (hereinafter SAVERS), Renewed Motion for Directed Verdict or Involuntary Dismissal as to Count II of Plaintiff's Complaint; Renewed Motion for Directed Verdict as to Impairment of Collateral or in the alternative Involuntary Dismissal; and Motion for New Trial or Motion for New Trial on Damages and/or Motion for Remittitur; and the Count having been provided with Memorandum of Law on file herein, having heard extensive argument of facts and law by counsel, having reviewed the pleadings on file herein, having reviewed selected portions of the transcript from the trial proceedings, and being otherwise duly advised in the premises, it is therefore

ORDERED AND ADJUDGED,

1. As to SAVERS' Renewed Motion for Directed Verdict or Involuntary Dismissal as to Count II of Plaintiff's Complaint, the same is hereby denied.

2. As to SAVERS' Renewed Motion for Directed Verdict as to Impairment of Collateral or in the alternative Involuntary Dismissal, the Court finds that Plaintiff, STAN BAUMANN, cannot recover his damages for loss or diminution in value of the development project and also recover, by way of the jury's verdict, a reduction on the indebtedness in the sum awarded by the jury as an impairment to the collateral. Same would constitute, in effect, a recovery of the same damages. Therefore, although the defense of impairment to collateral is valid and was properly presented to the jury, as a result of the jury's verdict, and only to that extent, SAVERS is granted relief on its Motion consistent with the finding of this Court and the Final Judgment to be entered herein shall accurately reflect this finding and Order of the Court.

3. As to SAVERS' Motion for New Trial or Motion for New Trial on Damages and/or Motion for Remittitur; the same is hereby denied.

4. Plaintiff's, STAN BAUMANN, Motion to Enter Final Judgment is hereby granted, and the Court directs that a Final Judgment be entered. The Final Judgment shall find in favor of Plaintiff, STAN BAUMANN, on his damages on his claim as awarded by the jury. The Final Judgment shall find in favor of SAVERS on mortgage and guaranty claims. The Final Judgment shall also find that SAVERS shall not recover any interest, other charges or costs arising from its Counterclaim. However, the issue of interest, other charges or costs is decided without prejudice to SAVERS filing as Motion for Rehearing.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 25th day of January, 1989.

_____

Circuit Judge

Copies furnished to:
Counsel

[FILED OCTOBER 8, 1991]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RE: 89-5208

STAN BAUMANN,

Plaintiff-Appellee, Cross-Appellant,

versus

SAVERS FEDERAL SAVINGS & LOAN ASSOC. and RESOLUTION TRUST CORPORATION, as conservator of Savers Federal Savings and Loan Association,

Defendants-Appellants, Cross-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: KRAVITCH, BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by appellants-cross-appellees, Savers Federal Savings and Loan Association and the Resolution Trust Company is denied.

The petition for rehearing filed by appellee-cross-appellant, Stan Baumann is denied.

ENTERED FOR THE COURT:

/s/ PHYLLIS KRAVITCH
United States Circuit Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 89-5208

STAN BAUMANN,

Plaintiff/Appellee/Cross-Appellant,

vs.

SAVERS FEDERAL SAVINGS AND LOAN ASSOCIATION and the RESOLUTION TRUST CORPORATION, as Receiver for Savers Federal Savings and Loan Association,

Defendants/Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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PETITION FOR REHEARING

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Attorneys for Appellee/ Cross-Appellant

PETITION FOR REHEARING

Comes now STAN BAUMANN, plaintiff/appellee/cross-appellant, by and through his undersigned counsel, pursuant to the provisions of Federal Appellate Rule 40, and files this his petition for rehearing and would respectfully suggest that in the decision and opinion rendered in the case at Bar, this Court overlooked, failed to consider or misapprehended the following:

1. This case went to the jury on numerous causes of action alleged by BAUMANN. Pertinent portions of the verdict form follow:

* * *

"We the Jury, return the following verdict:

"1. On the following claims of STAN BAUMANN against SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION, we find for:

"A. BREACH OF CONTRACT —
STAN BAUMANN X SAVERS __

"B. BREACH OF STATUTORY DUTY OF GOOD FAITH —
STAN BAUMANN X SAVERS __

"C. TORTIOUS INTERFERENCE —
STAN BAUMANN __ SAVERS X

"D. CONVERSION OF ($27,000) —
STAN BAUMANN __ SAVERS X

"E. CONSPIRACY ($27,000) —
STAN BAUMANN __ SAVERS X

"F. CIVIL THEFT —
STAN BAUMANN __ SAVERS X

"G. FRAUD —
STAN BAUMANN __ SAVERS X

* * *

2. *This Court has overlooked the fact that the jury specifically found against BAUMANN on his fraud count and awarded no recovery.*

3. The jury found *in favor* of BAUMANN on his breach of contract count. Specific breaches of the written loan documents were spread before the jury throughout the entire course of this trial. For example:

a. The loan documentation provided that, at SAVERS' option, SAVERS could draw interest from the interest reserve. SAVERS drew interest from the interest reserve for two months and then abruptly refused to fund any further from that reserve. BAUMANN argued before the jury that SAVERS breached the written loan documentation because once it had exercised the option to draw against the reserve, it was obligated to continue to do so.

b. SAVERS' obligation to fully 100% fund the loan was not the result of any "side agreements," but arose out of the loan documentation. SAVERS was obligated to fund 80% of the appraised value of the project when it was to be completed. The appraisals which were made a part of the record revealed that the appraised value when viewed with the amount of the loan committed, required SAVERS to fully fund the project. BAUMANN argued SAVERS' refusal to fully fund the loan and arbitrary holding back of funds due subcontractors who had completed their work constituted a breach of the contract and caused damages to BAUMANN. The jury obviously found that SAVERS had breached the contract in this regard.

c. The contract documentation clearly required that SAVERS fund within five days of any draw request. On this record it has been clearly shown that SAVERS did not timely fund any draw requests.

d. With regard to the Concept II project a specific method was provided in the loan documents for releasing real property from SAVERS MORTGAGE at an established price per square foot so that BAUMANN could do as he wished with the property.

e. SAVERS unduly delayed providing documentary information to a prospective tenant for a large area of restaurant space, thereby causing the loss of the tenant.

4. The jury's finding that SAVERS was guilty of breach of contract is, therefore, supported by documentary evidence and other evidence entirely aside and apart from BAUMANN's testimony regarding assurances given him by SAVERS. The jury's finding against BAUMANN on his fraud count discloses that it was not swayed by any of the oral testimony which, according to this Court's opinion, was admitted in violation of the D'OENCH doctrine.

5. Simply put, the jury here disregarded the testimony that this Court finds violative of the D'OENCH doctrine, ruled against BAUMANN on his fraud count and in his favor on his breach of contract count which is fully supported by admissible evidence. For this reason alone, the D'OENCH doctrine is inapplicable here.

It is respectfully submitted that for the reasons stated herein, this Court should grant this petition for rehearing.

Respectfully submitted,

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By: /s/ EDWARD A. PERSE
Edward A. Perse

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing was mailed to the entities on the attached list this 28th day of August, 1991.

/s/ EDWARD A. PERSE
Edward A. Perse

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 89-5208

STAN BAUMANN,

Plaintiff/Appellee/Cross-Appellant,

vs.

SAVERS FEDERAL SAVINGS AND LOAN ASSOCIATION and the RESOLUTION TRUST CORPORATION, as Receiver for Savers Federal Savings and Loan Association,

Defendants/Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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AMENDED PETITION FOR REHEARING

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c. The contract documentation clearly required that SAVERS fund within five days of any draw request. On this record it has been clearly shown that SAVERS did not timely fund any draw requests.

d. With regard to the Concept II project a specific method was provided in the loan documents for releasing real property from SAVERS MORTGAGE at an established price per square foot so that BAUMANN could do as he wished with the property. BAUMANN Federal Expressed a letter to SAVERS setting forth what he perceived the release price to be and asking that SAVERS respond immediately because BAUMANN had only a ten-day commitment on a bridge loan to fund the release. BAUMANN even enclosed the prepaid Federal Express envelope to SAVERS. SAVERS failed to completely respond to this request, and one of its officers in a memorandum to another in effect asked what else could be squeezed out of BAUMANN before acting on his request for a release.

e. SAVERS unduly delayed providing documentary information to a prospective tenant for a large area of restaurant space, thereby causing the loss of the tenant.

4. The jury's finding that SAVERS was guilty of breach of contract is, therefore, supported by documentary evidence entirely aside and apart from BAUMANN's testimony regarding assurances given him by SAVERS. The jury's finding against BAUMANN on his fraud count discloses that it was not swayed by any of the oral testimony which, according to this Court's opinion, was admitted in violation of the D'OENCH doctrine.

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Attorneys for Appellee/
Cross-Appellant

By: /s/ EDWARD A. PERSE
Edward A. Perse

I DO HEREBY CERTIFY that a true copy of the foregoing Amended Petition for Rehearing was mailed to the entities on the attached list this 28th day of August, 1991.

/s/ EDWARD A. PERSE
Edward A. Perse

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 89-5208

STAN BAUMANN,

Plaintiff/Appellee/Cross-Appellant,

vs.

SAVERS FEDERAL SAVINGS AND
LOAN ASSOCIATION and the
RESOLUTION TRUST CORPORATION,

Defendants/Appellants/Cross-Appellees.

Appellant's Petition for Rehearing

Appellants, Savers Federal Savings and Loan Association ("Savers Federal") and the Resolution Trust Company ("RTC"), as receiver for Savers Federal, respectfully petition for rehearing because the Court's opinion, rendered July 9, 1991, overlooks the counterclaim in this case. Although the judgment below allowed a partial recovery on the counterclaim and both Baumann and the RTC appealed the judgment, the opinion does not indicate how it is disposing of that part of the appeal.

Through the counterclaim, Savers Federal[1] sought to require Stan and Phyllis Baumann to repay the principal, interest, costs, and fees which are due under the loan

[1] Although the appeal from the judgment on the counterclaim has been maintained in the name of Savers Federal, the counterclaim has been sold to the RTC, as conservator for Savers Savings Association, and that RTC conservator is now the real party in interest. *See* Defendants' Notice of Transfer of Interest (filed in this Court November 6, 1989).

documents giving rise to this case and to foreclose its mortgage. The court below had held that Savers Federal was entitled to recover only the principal which it had lent to Baumann and allowed foreclosure for that amount through a set off against Baumann's judgment on his claim. Savers Federal and the RTC asked this Court to affirm its recovery of principal and its entitlement to foreclosure, to reverse the denial of interest, costs, and fees, and to direct entry of a judgment allowing recovery of all amounts due under the loan documents.

Although this Court may simply have intended to remand the case for readjudication of all issues — including all aspects of both the claims and counterclaim — doing so may create confusion below because (I) Phyllis Baumann did not appeal and therefore, as a jurisdictional matter, she is not entitled to have *any* aspect of the judgment on the counterclaim against her reversed, (II) Stan Baumann presented no basis to reverse the trial court's holding that Savers Federal is entitled to recover its principal and remand is unnecessary to determine that Savers Federal is entitled, as a matter of law, also to recover all interest, costs, and fees due under the loan documents, and (III) if the district court is to dispose of the counterclaim, the opinion provides no explicit directions regarding what remains to be adjudicated.[2]

The Pertinent Rehearing Facts

The judgment below (RE494) consisted of two parts. The first awarded Baumann $15,400,000 on his claim. The second awarded Savers Federal $8,034,797.10 on its counterclaim against Stan and Phyllis Baumann under unconditional guaranties, representing the principal that

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[2]The RTC recognizes that the law of the case "does not extend to issues the appellate court did not address." *United States v. White*, 846 F.2d 678, 684 (11th Cir. 1988). It also is wary, however, that the doctrine "encompasses matters decided by necessary implication." *Id.*

Savers Federal had loaned to Baumann. The judgment did not award Savers Federal any interest on the principal which it had lent, or any attorneys' fees or costs incurred in the collection and foreclosure action.

The judgment then set off Savers Federal's recovery against Baumann's recovery, extinguished Savers Federal's mortgage, and awarded Baumann a "net judgment" of $7,365,202.90. Both the RTC and Baumann appealed the judgment. Phyllis Baumann did not, however, appeal any aspect of the judgment.

Rehearing or clarification should be granted in this case because of the confusion which the opinion may create below regarding the status of the counterclaim. Specifically, the RTC requests clarification as to the three following points.

I.

Reversal of the RTC's Judgment Cannot Affect the Judgment Against Phyllis Baumann Because She Did Not Appeal

The Court may have overlooked that Phyllis Baumann, a co-guarantor of Savers Federal's note against whom the trial court held Savers Federal was entitled to collect a judgment, has waived her right to contest this aspect of the judgment and therefore it must be affirmed as against her. A notice of cross-appeal was filed pursuant to Federal Rule of Appellate Procedure 4(a)(3) solely by Stan Baumann. (V1-D13). Phyllis Baumann was not named in the notice of appeal and she has not joined in the appeal at any time. (Reply Brief at 44.) Neither Stan nor Phyllis Baumann have taken issue with the point.

"The general principle that a judgment will not be altered on appeal in favor of a party who did not appeal . . . applies to cases in which the interests of the party not appealing are aligned with those of the appellant. Thus, if co-defendants are held liable below, and one appeals and one

does not, the party appealing does not stand as surrogate for the one who does not, and even though the judgment is reversed, the party not appealing remains liable, despite the fact that the liability of each depends upon the same legal principles." 9 *Moore's Federal Practice* ¶204.11[4] at 4-56-57. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (holding that appellate court lacks jurisdiction over plaintiff's appeal where plaintiff was not named because of secretary's clerical error in notice of appeal filed by 15 co-plaintiffs); *Stockstill v. Petty Ray Geophysical, a Division of Geosource, Inc.*, 888 F.2d 1493 (5th Cir. 1989) (concluding the rationale of *Torres* is applicable to cross-appeals under Rule 4(a)(3)).

Thus, although this Court has jurisdiction to reverse that aspect of the verdict which awards $15.4 million to Stan Baumann on his claim and to reverse or affirm that aspect of the judgment which awards $8+ million to Savers Federal against Stan Baumann, it does not appear to have jurisdiction to reverse that aspect of the judgment below which awards $8+ million to Savers Federal against Phyllis Baumann.

II.

Recovery of the Loan Principal, and all Interest, Costs, and Fees Due Under the Loan Documents Should be Directed

Near the end of its opinion, the Court observes that although its conclusion that the *D'Oench* doctrine may be raised "warrants reversal of the outcome reached in the trial court, we cannot ultimately resolve the case at this stage of the proceedings. We reach this conclusion based on our determination that a jury could still find in favor of Baumann in this case." Slip op. at 4071.

The RTC respectfully requests reconsideration of this holding in light of the counterclaim. Whether this Court can and should ultimately resolve Baumann's claims against the

RTC is a very different question than whether it can and should ultimately resolve Savers Federal's *counterclaim* against the Baumanns.

The distinction between the issues is shown by comparing the arguments made against the claim to those made in support of the counterclaim. The RTC has maintained through highly-detailed arguments in this appeal that no reasonable jury could find for Baumann on his claims because Baumann offered no evidence at trial that Savers Federal breached the material requirements of the written loan documents (Initial Brief at 36) or that Savers Federal caused him any damage whatsoever (Initial Brief at 29), and that Florida law does not recognize an independent action for breach of duty of good faith (Initial Brief at 37).

The RTC argued that Baumann's claims rest on evidence that Savers Federal did not administer the loan in accordance with alleged oral side agreements between Baumann and Savers Federal's former officers. (*See* Appellants' Reply and Response to Cross Appeal at 8-24.) If the arguments were correct, the claims against the RTC receiver would be barred as a matter of law, *see Savers Federal Savings & Loan Ass'n v. Amberley Huntsville, Ltd.*, Nos. 90-7307 & 90-7308, slip op. at 3944 (11th Cir. June 28, 1991) (applying *D'Oench* to bar defenses), and would, in any event, be unsupported by evidence of damage.

This Court could have addressed these arguments and directed entry of a judgment on them. *See FDIC v. Kasal*, 913 F.2d 487, 493 (8th Cir. 1990) (directing entry of judgment against counterclaims barred by *D'Oench* even though district court had not considered the *D'Oench* issue). But given the complexity of the issues raised by the RTC (necessitating review of a voluminous record or an intricate application of *D'Oench* or both), the RTC acknowledges that this Court appropriately left those issues to the district judge to sort out by summary judgment or other appropriate procedure. *See Sales v. State Farm Fire and Casualty Co.*,

902 F.2d 933, 935 (11th Cir. 1990) (holding a "mandate from this court ordering a new trial does not preclude the district court from entering summary judgment").

With respect to Savers Federal's counterclaim, however, the Court should not exercise its discretion to forestall determination of the issues presented on appeal. It is clear beyond any doubt at this stage that a jury could not find in favor of Baumann on his defenses to Savers Federal's straight-forward counterclaim to recover its principal and all interest, costs, and fees due under the loan documents and to foreclose its mortgage. "A remand, with its accompanying expenditure of additional judicial resources . . . is a step not lightly taken and one that should be limited to cases in which further action must be taken by the district court or in which the appellate court has no way open to affirm or reverse the district court's action under review." *Consolidated Aluminum Corp. v. Foseco International, Ltd.*, 910 F.2d 804, 814 (Fed. Cir. 1990). In this case, the "existing record [is] sufficient to allow [the court of appeals] to decide" the counterclaim and therefore remand should not be directed on that issue. *See Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990).

The briefs filed in this Court showed that under both state and federal law Savers Federal was entitled to recover the principal which it had loaned to Stan Baumann. In fact, the trial court below had agreed with the state law point and had allowed a recovery of the full amount principal. Baumann's briefs demonstrated no basis for reversal.

The briefs also showed that the RTC was entitled under both state and federal law to recover all interest, cost, and fees due under the loan documents, that the judgment on the counterclaim should be reversed to the extent that it precluded such a recovery, and that the trial court should be directed to increase the RTC's recovery to include all interest, costs and fees due.

This Court's opinion does not address these points but should do so to avoid confusion below as well as to help bring this case to an economical end. The RTC and Savers Federal should not be required to relitigate that which already has been established and has not been explicitly reversed. The RTC and Savers Federal also should not be required to relitigate those points which establish that the trial court should have awarded interest, costs, and fees on the counterclaim below.

The following points briefly reiterate the bases which this Court has for directing entry of a judgment on the counterclaim at this time.

A. Under State Law, Baumann's Defenses to the Counterclaim are Invalid

The essence of Savers Federal's counterclaim against Baumann was that he and his wife had provided Savers Federal with an unconditional guaranty of repayment, that the loan was in default, and that the entire principal, interest, and collection costs were required to be repaid. Baumann did not dispute that the loan was in default or that he and his wife had provided a guaranty of repayment. Instead, he argued that he should be forgiven repayment by the amount of damage which Savers Federal had inflicted upon the collateral — the property acquired and developed with the loan proceeds — which he had provided to secure the loan. Baumann argued that section 673.606(1)(b), Florida Statutes (1989), and the Florida common law, allow impairment of collateral as a defense to an action on an unconditional guaranty.

Section 673.606(1)(b) plainly does not assist Baumann, however, because Baumann waived impairment of collateral as a defense when he signed the guaranty. The statute specifically authorizes such waivers in providing:

> The holder [of an instrument] discharges any party to the instrument to the extent that *without*

> *such party's consent* the holder . . . [u]njustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

Baumann wholly overlooked the fact that when he and his wife signed the guaranty at issue in this lawsuit they expressly consented to allow Savers Federal to impair or otherwise dispose of the collateral which they gave for the loan. The guaranty specifically stated: (1) "Stan Baumann and Phyllis Baumann . . . do hereby unconditionally guarantee to Lender . . . the full, punctual and prompt payment of the Guaranteed Indebtedness;" (2) "Lender may at any time . . ., without prejudice to any claim against Guarantors . . . exchange, lease *or surrender* all or any part of the security which Lender may at any time hold as security for the payment of the Guaranteed Indebtedness;" (3) "The Guarantors waive any right to require Lender to . . . proceed against or exhaust any security held by Lender for the payment of the Guaranteed Indebtedness;" and (4) "Until the Note and all sums secured by the Security Instruments, including the Guaranteed Indebtedness, have been paid in full to the Lender, the Guarantors hereby . . . waive any right that Guarantors have or to which Guarantors may be entitled in and to the benefit of any security which Lender may at any time hold in connection with the Guaranteed Indebtedness." (DEx12 at 30¶(e), PEx2 at ¶IV(B) & RE478, DEx12 at 36) (emphasis added).

"Such contractual waivers [by guarantors] . . . have been consistently upheld by the courts" and are in accord with "the well-established principle that under an absolute and unconditional contract of guaranty . . . it is no defense that the creditor has lost security or has been negligent in regard to protection of the collateral." *von Dunser v. Southeast First National Bank*, 367 So.2d 1094, 1096 (Fla. 3d DCA 1979) *See also Fegley v. Jennings*, 44 Fla. 203, 32 So. 873 (1902); *A & T Motors, Inc. v. Roemelmeyer*, 158

So.2d 567 (Fla. 3d DCA 1964). In *Cleeveley v. Florida City Magazines, Inc.*, 486 So.2d 81, 82 (Fla. 2d DCA 1986), the court pointed out that when a guaranty specifically consents to "the 'surrendering' of the security without impairing the guaranty," as the Baumanns did here, impairment of collateral is not a defense to an action on the guaranty.

The Fifth Circuit recently examined this same issue in *FDIC v. Nobles*, 901 F.2d 477 (5th Cir. 1990), observing that the guarantor "essentially is arguing that he should be discharged from his obligations under the guaranty because the FDIC 'impaired' (i.e., failed to preserve and protect) the collateral securing the debt that he guaranteed." *Id.* at 480. Interpreting language of the Texas UCC which is identical to section 673.606(1)(b), Florida Statutes, the court of appeals held that the impairment of collateral is not allowed as a defense when the party has consented through a guaranty to the alleged impairment. *See also National Acceptance Co. v. Demes*, 446 F. Supp. 388, 390-91 (applying identical language of the Illinois UCC).

Baumann's "impairment of collateral" defense to Savers Federal's counterclaim also has been shown to be insufficient as a matter of law because they seek to impose liability on the RTC which is duplicative of the claim which he makes directly against the RTC. The project that was being developed by Baumann served as the collateral for the loan. Any "impairment of collateral" which might be found by a jury therefore necessarily would consist of a diminution in the value of the project. But the essence of Baumann's affirmative claim against the RTC receiver is that it diminished the value of the project. Therefore, Baumann could not be allowed, as a matter of law, to pursue his main claim and an impairment of collateral defense.

Savers Federal also has shown in this appeal that Baumann failed to offer any evidence to quantify the degree to which the collateral was impaired. "In raising this defense, the [borrowers] have the burden of proving that an

unjustified impairment of collateral has occurred, *and the extent of the impairment.*" *Peacock v. Farmers and Merchants Bank*, 454 So.2d 730, 733 (Fla. 1st DCA 1984) (emphasis added). The evidence offered by the Baumanns with respect to the extent of the alleged impairment of collateral was identical to the evidence offered to quantify Baumann's damage claim. As discussed extensively in the initial brief, that evidence is insufficient to uphold a finding of any damage.

With respect to the interest, costs, and attorneys' fees called for by the loan documents (DEx12 at ¶30(f), RE478) and sought by Savers Federal on its counterclaim, but denied in the trial court, Savers Federal demonstrated that reversal and a judgment for it was required by state law. (Initial Brief at 40-43.) Courts are not empowered to "rewrite" a guaranty contract by invoking equitable powers as Baumann persuaded the trial court that it could. *See, e.g., Jacquin-Florida Distilling Co. v. Reynolds, Smith & Hills, Inc.*, 319 So.2d 604, 608 (Fla. 1st DCA 1975) (error to disallow based on equitable principles interest and costs in contract action).

Savers Federal and the RTC expressly raised all of these state law points in asking this Court to affirm the trial court's determination that Stan and Phyllis Baumann must repay the principal amount of the loan, to overturn the trial court's denial of interest, cost, and fees on the counterclaim, and to direct entry of judgment for the RTC for both the principal and the interest, cost, and fees arising from the loan. (See Appellants' Initial Brief at 40-43; Appellants' Reply and Response to Cross-Appeal at 36-38, 43-49.) They should not be required to relitigate these points on remand which do not require the Court either to assess the applicability of the *D'Oench* doctrine or to engage in an elaborate review of the record.

B. Federal Law Bars Baumann's Defenses to the Counterclaim

Although *D'Oench* was not, and could not be raised below to attack Baumann's defenses to the counterclaim, the application of the doctrine so plainly bars those defenses that this Court, independent of the state grounds for doing so, may and should direct entry of judgment for Savers Federal on the counterclaim. Where application of the *D'Oench* doctrine or 12 U.S.C. §1823 to " 'the record permits only one resolution of the . . . issue,' " *FDIC v. Kasal*, 913 F.2d 487, 493 (8th Cir. 1990) (citation omitted), it is appropriate for the appellate court to direct entry of judgment on that issue, even though the district court did not have an opportunity to consider it. That is precisely what happened in *Kasal*. The court of appeals found remand of claims against an FDIC-receiver unnecessary "since those claims are based on . . . secret unwritten side agreements." *Id.*

In the instant case, Baumann's defenses to Savers Federal's counterclaim are no less clearly barred by *D'Oench* 12 U.S.C. §1823(e). Indeed, this Court recently held in *FSLIC v. Gordy*, 928 F.2d 1558 (11th Cir. 1991), that defenses similar to those which Baumann raises to Savers Federal's counterclaim in this action are barred by *D'Oench*. In *Gordy*, as in the instant case, the borrowers had signed "facially unqualified guaranties." *Id.* at 1564. The borrowers sought to avoid liability by showing that the institution from which they obtained the loan orally had agreed to limit enforceability of the guaranty.

The borrowers conceded, however, that the alleged agreement to limit the unconditional guaranty had not been " 'memorialized in writing or otherwise made explicit such that the FSLIC or the FDIC would have knowledge of the bank's obligations during an evaluation of the bank's records.' " *Id.* (citation omitted). By making this side arrangement with the institution, the borrowers " 'lent

[themselves] to a scheme or arrangement that is likely to mislead the banking authorities,' " *id.*, and therefore this Court held the defenses were barred by *D'Oench*. *Id.* at 1564-65.

The borrowers in *Gordy* also advanced arguments for limitation of *D'Oench* which are similar to those argued by Baumann in this court: that a jury should be entitled to find that the insolvent institution fraudulently induced the signing of the guaranties and that the borrowers acted in good faith, rather than with any intention to deceive the FSLIC.

This Court held that neither argument gave rise to a jury question, explaining that fraud in the factum — such as the alteration of the note itself — is the sole type of fraud which "would preclude application of the *D'Oench* doctrine." *Id.* at 1565. In the instant case, Baumann never has even argued that there was any fraud in the factum. He testified that he read the loan documents, that he had his lawyers read them, that he signed them, and that he regarded them as binding. (T1355-65.) Thus, application of *D'Oench* here plainly would require a judgment for Savers Federal for all principal, interest, costs, and fees due under the loan documents, even if state law did not.

C. The Court Should Indicate That the RTC is Free to Seek Interest, Fees, and Costs, as Provided in the Loan Documents

If the court concludes that notwithstanding the arguments above that the reversal vacates all aspects of the judgment below, the RTC respectfully requests that the court clarify the opinion so that it will indicate explicitly that the trial court can and should adjudicate all issues presented by both the claim and the counterclaim and that it may do so either through summary judgment or trial, whichever may be appropriate. *See Sales*, 902 F.2d at 935.

This Court has observed that "Determining the scope of a mandate can present problems with interpretation. The case law is replete with examples of disputes arising from interpretations of mandates." *Litman v. Massachusetts Mutual Life Ins. Co.*, 825 F.2d 1506 (11th Cir. 1987) (en banc). In filing this motion, the RTC seeks to prevent any such problem from occurring in this case.

CONCLUSION

The Court should grant rehearing or clarify the opinion to indicate that on remand the district court should enter a judgment on the counterclaim requiring Stan and Phyllis Baumann to repay the principal amount of the loan, and all interest, costs, and fees due under the loan documents. Alternatively, rehearing or clarification should be granted to indicate that the trial court can and should adjudicate all issues presented by the claim and the counterclaim and that it may do so either through summary judgment or trial, whichever may be appropriate.

Respectfully submitted,

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FOR THE ELEVENTH CIRCUIT

CASE NO. 89-5208

STAN BAUMANN,

Plaintiff/Appellee/Cross-Appellant,

vs.

SAVERS FEDERAL SAVINGS AND LOAN ASSOCIATION and the RESOLUTION TRUST CORPORATION,

Defendants/Appellants/Cross-Appellees.

Agreed Joint Motion for Enlargement of Time

Plaintiff/appellee/cross-appellant Stan Baumann (Baumann) and defendants/appellants/cross-appellees Savers Federal Savings & Loan Association (Savers Federal) and the Resolution Trust Corporation (RTC) jointly move for a 30-day enlargement of time in which to file their motions for rehearing and/or clarification. Pursuant to Eleventh Circuit Rule 40-2, a motion for rehearing must be filed on or before July 30, 1991. A 30-day enlargement of time would require the parties to file their respective motions on or before August 29, 1991. As grounds for this agreed motion, the parties would show the Court:

1. Counsel for Baumann is currently on vacation and will not return until August 1, 1991.

2. Counsel for Savers Federal and the RTC is in trial in *Southern Air Transport, Inc. v. Post-Newsweek Stations of*

Florida, Inc., case no. 87-23989 CA 22 (11th Judicial Circuit in and for Dade County, Florida), which commenced on June 17, 1991, and is expected to last between six and eight weeks.

3. Counsel for Baumann has authorized counsel for Savers Federal and the RTC to file this agreed joint motion.

Wherefore, the parties respectfully request that they be permitted to file their motions for rehearing and/or clarification on or before August 29, 1991.

Respectfully submitted,

Steel Hector & Davis
Attorneys for Savers Federal Savings and Loan Association and the Resolution Trust Corporation

By /s/ EMILY WHEELER

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Agreed Motion for Enlargement of Time was mailed July 19, 1991, to:

Lise Armater
Maurice Graham, P.A.
Attorneys for AAA Builders, Inc.
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Miami, FL 33131

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

July 26, 1991

MEMORANDUM TO ADDRESSEES:

RE: 89-5208 Baumann v. Savers Federal Savings
DC DKT NO.: 89-06105 CIV-NCR

The following action has been taken in the referenced case:

* An extension of time has been granted to and including August 29, 1991 for filing a petition for rehearing, which is due to be filed in the clerk's office on said date.

Sincerely,

/s/ MIGUEL J. CORTEZ
MIGUEL J. CORTEZ, Clerk

Reply To: Brenda Wiegmann (404) 331-3833